United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1062

To be argued by
B. ALAN SEIDLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

. x

UNITED STATES OF AMERICA, :

Appellee, :

- against - :

GINO REDA, :

Defendant-Appellant. :

. x

B P/S

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

I. Whether the search of the sealed box seized from the appellant at the time of his arrest was unreasonable and unconstitutional.

II. Whether the search of the premises at 1910 Hone Avenue, Bronx, New York on August 26, 1976, and the resultant seizure of narcotics and other items was in violation of appellant's Fourth and Fifth Amendment rights.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a conviction rendered on January 7, 1977, after jury trial in the United States District Court for

the Southern District of New York (The Honorable Charles E. Stewart, Jr.,) finding appellant guilty of each and every count of Indictment Number 76 Crim. 873. Appellant Reda was sentenced under Counts 1, 3, and 4 to three years in jail and three years of special parole under Title 21, Section 841, subparagraph (b)(1)(A). Appellant was separately sentenced on Count 2, and received the same sentence; that is three years in jail plus three years special parole. All sentences to run concurrently.

B. Alan Seidler, Esq., was assigned as appellant's counsel for purpose of filing and prosecuting his appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The appellant, Gino Reda, was arrested on August 26, 1976, and subsequently charged by way of indictment number 76-CR-873 with one count of conspiracy to distribute and possess with intent to distribute cocaine in violation of Title 21, United States Code, Section 846, one count of distributing cocaine and two counts of possession of cocaine with the intent to distribute it, in violation of Title 21, United States Code, Section 812, 841(a)(1), and 841(b)(1)(A), and Title 18 United States Code, Section 2. Also named as a co-conspirator was appellant Luis Reda.

Following the denial of appellants' request for an Order suppressing and prohibiting the use of all property seized at the time of his arrest, and all property seized pursuant to a

search warrant, at premises 1919 Hone Avenue, Bronx, New York on August 26, 1976, appellant's first trial commenced. However, said proceedings were short lived when a Government witness, John Tufo, expressed fear for his life in front of the jury. Judge Stewart granted appellant's request for a mistrial, and the second trial of Gino Reda immediately followed. For the purposes of the first and second trials of Gino Reda, co-conspirator Luis Reda was severed because of the possibility of "Bruton" problems arising.

The Government's chief witness against appellant was Mr. John Tufo, a paid informant for the United States Drug Enforcement Administration. Mr. Tufo and appellant were old acquaintances and it was even stated by Mr. Tufo that his primary motive in acting as an informant in this case was to seek revenge for Mr. Reda's role in sending him to prison in 1965 (63-64).[1] During the period between July 8, 1976 and July 23, 1976, Tufo attempted to contact appellant to arrange for the sale of narcotics (79) on numerous occasions (81), however without success. The customers which Mr. Tufo wished for appellant to sell drugs to were named "Danny" (Daniel Fernandez) and "John" (John Reape) -- both agents for the D.E.A.

Finally, on August 18, 1976, at the Castle Hill Diner in the Bronx, Mr. Tufo managed to arrange a meeting between apellant and the two agents. It is alleged that at that meeting, appellant offerred to sell four pounds of cocaine at $24,800 per

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[1] Numerals in parentheses refer to pages of the trial transcript.

pound to Danny and John (117). Mr. Tufo was to receive a $500 commission or finders fee (118). Later that night, Agent Fernandez called appellant at a public pay phone outside of said diner to confirm the arrangements. However, between this date and August 23, 1976, appellant told Mr. Tufo on repeated occasions that he really did not wish to go through with the transaction (133).

On August 24, 1976, Mr. Tufo and two undercover agents were at the Castle Hill Diner when it was alleged that appellant drove his car into the parking lot and handed a sample of the cocaine contained in a Marlboro box, to Mr. Tufo. Appellant then left the location (151). Later that afternoon, appellant met with the two agents to discuss delivery of the four pounds of cocaine, but because of their inability to agree as to the precise method of delivery, the negotiations failed.

It was the contention of the Government that at this point, appellant decided to send the cocaine which was to have been sold back to its source in Florida, and that on August 26, 1976, appellant was in the process of doing so when he was arrested at LaGuardia Airport carrying a sealed box containing the narcotics. Also found in said box was $1,350 in American currency; two handwritten notes; a book of coupons; and miscellaneous papers.

Later that same day, August 26, 1976, the co-defendant Luis Reda was also arrested, and a search warrant was executed

for Luis' second floor rear apartment at 1919 Hone Avenue, Bronx, New York. Said apartment was also the residence of appellant when he would travel to New York from his Florida home on weekends. As a result of this search, the D.E.A. seized an attache case with quantities of cocaine and marihuana contained therein; two scales; a jar of lactose; telephone and address books; note books and other items.

At the close of the Government's case the appellant testified and interposed a defense of "entrapment". Appellant maintained that he and Mr. Tufo were quite close friends (734); that appellant tried to help Mr. Tufo seek employment (735); that Mr. Tufo stayed at appellant's home in Florida (737); that appellant constantly lent money to Mr. Tufo (738-9); that during July and August of 1976, Mr. Tufo incessantly implored appellant to supply him with narcotics (740). Appellant denied ever having been involved with drugs before and that he went along in this scheme, by pretending he was a big dealer, so as to establish Mr. Tufo's credentials and thus allow Tufo to "rip off" Danny and John.

Appellant further contended that the drugs found in the box at the time of his arrest, and at 1910 Hone Avenue, were supplied to him by Mr. Tufo. That it was through the repeated, constant, and deceitful importuning by Mr. Tufo of the appellant that caused the latter to have contact with narcotics. That the

whole scheme which forms the basis of the indictment was the creation of the perverted mind of Mr. Tufo.

After the charge of the Court the jury returned verdicts of guilty against appellant as to counts 1, 3, and 4, their being unable to reach agreement as to count 2. Subsequently, the appellant was retried on the second count, this time being joined with Luis Reda in the proceedings. At the third trial said seized evidence was again introduced by the Government, and appellant was ultimately convicted of the remaining count.

POINT I

THE SEARCH OF THE SEALED BOX SEIZED FROM THE APPELLANT AT THE TIME OF HIS ARREST WAS UNREASONABLE AND UNCONSTITUTIONAL AND ALL EVIDENCE DERIVED FROM SUCH SEARCH SHOULD HAVE BEEN SUPPRESSED.

On August 26, 1976, the appellant was arrested at LaGuardia Airport by agents of the Drug Enforcement Administration. Upon arresting the appellant and placing him in handcuffs, the agents removed from the appellant's possession a sealed box containing cocaine, two notes written by appellant, and one thousand fifty dollars ($1,050.00).

After the seizure of said box it was not opened or searched until subsequent to the arrest, when it was brought to the office of the United States Attorney in Manhattan.

Even though the box was not opened at the time of the defendant's arrest, but at a time and place substantially removed

from said arrest, no search warrant was obtained by the federal authorities prior to the search. This, despite the fact that ample opportunity was had to obtain a search warrant and the lack of any surrounding "exigent circumstances".

In McDonald v. United States, 355 U.S. 451, (1948) the Supreme Court in addressing the necessity of obtaining a search warrant prior to any search stated at page 455:

> "No reason, except inconvenience of the officers in preparing papers and getting before a magistrate appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement...
>
> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weighthe need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and arrest of criminal.... We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that th exigencies of the situation made that course imperative."

In Trupiano v. United States, (1948), 334 U.S. 699, the Supreme Court held that in all cases a search warrant must be

obtained, prior to any search, whenever reasonably practicable. It further held that something more in the way of necessity, over and above a mere arrest, must be shown before a search incidental to a lawful arrest could be made without a search warrant.

Two years later, in United States v. Rabinowitz, (1950) 339 U.S. 56, the Supreme Court overruled Trupiano (supra) to the extent that it required a search warrant in all cases as a sine qua non to the reasonableness of a search.

In Rent v. United States, 209 F. 2d 393 (C.A. 5th Cir. 1954), the Court in discussing the Rabinowitz ruling stated:

> "The government apparently takes the position that since the decision in United States v. Rabinowitz, supra, the practicability of procuring a search warrant is not to be considered in deciding whether the search without a warrant was reasonable. We do not understand that the decision in that case went so far...
> Rather the Court said that whether the search was reasonable depends upon the facts and circumstances - the total atmosphere of the case".

In Preston v. United States, (1964) 376 U.S. 364, the Supreme Court in stating the limitations of a search incidental to a lawful arrest held at page 367:

> "The rule allowing contemporaneous searches is justified, for example by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime - things which might easily happen where

> the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." (emphasis supplied).

In Chimel v. California, (1968) 395 U.S. 752 the Supreme Court cited Preston v. United States, supra, with approval and reaffirmed the rationale of the case. The Court overruled United States v. Rabinowitz, supra, to the extent it conflicted with the Court's decision and remarked that the Rabinowitz case was "hardly founded on an unimpeachable line of authority". The Court citing United States v. Jeffers, 342 U.S. 48, 51 stated:

> "Clearly the requirement that a search warrant be obtained is not lightly to be dispensed with, and the 'burden is on those seeking [an] exemption [from the requirement] to show the need for it...' ".

In United States v. Free, 437 F. 2d 631 (C.A. D.C. Cir. 1970), the Court is analyzing the Chimel (supra) decision held at page 633:

> "Chimel corrected these evils in two ways. First it gave new life to a line of cases which hold that the doctrine of search incident to arrest is confined by the 'cardinal rule' that a search warrant must be obtained whenever reasonably practicable; that the warrant requirement is not lightly to be dispensed with but rather the burden is on the Government to show the need for an exemption. [cases omitted] Second, Chimel limits the doctrine of search permissible without a warrant even in a home, because made in-

> cident to an arrest, to 'a search of the arrestee's person and the area "within his immediate control" - construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence' ".

In the instant case it is clear that the search of the sealed box was unreasonable and in violation of the defendant's Fourth Amendment rights.

Upon arresting and handcuffing the appellant and removing the box from him, no exigent circumstances existed justifying a warrantless search. The appellant could not seize a weapon from the box nor could he destroy its contents. Thus a search without a warrant was unreasonable and unconstitutional.

Further, Preston v. United States, supra, makes clear that a search remote in time or place from the arrest simply does not constitute a search incidental to an arrest. Certainly no justifying cause existed for searching the sealed box at a time subsequent to the defendant's arrest and at a location removed from the place of the arrest. Under the circumstances of the instant case a search warrant prior to searching the sealed box was mandatory.

The sealed box having been searched in violation of the defendant's Fourth Amendment rights, the contents of the box, the box itself, and all the evidence so derived should have been suppressed.

POINT II

THE PROPERTY SEIZED FROM PREMISES 1910 HONE AVENUE, BRONX, NEW YORK WAS SEIZED IN VIOLATION OF THE DEFENDANT'S FOURTH AND FIFTH AMENDMENT RIGHTS AND SHOULD HAVE BEEN SUPPRESSED.

On August 26, 1976, at approximately 2:00 P.M. in the afternoon, a search of the premises 1910 Hone Avenue, Bronx, New York, was conducted pursuant to a search warrant. The search warrant was issued the prior day and described as the property to be seized: "A quantity of cocaine hydrochloride, and other paraphernalia."

After searching a briefcase within said apartment and discovering a quantity of cocaine, the federal agents continued the search, racing and rummaging through the apartment and seizing numerous items and property not described with reasonable particularity in the body of the warrant and which the government introduced as evidence against the appellant at one or two of the three trials.

Such items included: travel brochures; airline flight schedules; shuttle passes; a Samsonite briefcase; a telephone address book; a scale from the top of the refrigerator; the contents of a vaccuum cleaner; a notebook alleged to contain appellant's notations; a passport in appellant's name; a jar of lactose; etc. Clearly, the great majority of the above items were not particularly enumerated by the search warrant.

Rule 41(e) of the Federal Rules of Criminal Procedure states:

> "A person aggrieved by an unlawful search and seizure may move the district court in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that ....(3) the property seized is not described in the warrant..."

The Fourth Amendment to the United States Constitution provides in part:

> "... and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

In Marron v. United States, 275 U.S. 192, 196 (1927) the Supreme Court held that the Fourth Amendment meant:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken, nothing is left to the discretion of the officer executing the warrant..."

The above language from Marron has been cited with the approval by the Supreme Court and reaffirmed on various occasions. See: Stanford v. Texas, 379 U.S. 476 (1964); Stanley v. Georgia, 349 U.S. 557 (1968); Berger v. New York, 388 U.S. 41 (1967).

In United States v. Dzialek, 441 F. 2d 212 (C.A. 2d Cir. 1971) this Court reversed a conviction based on evidence seized

pursuant to a search warrant containing insufficient particularization. The Court held that such seizure violated the constitutional requirements that search warrants must particularly set forth that which is to be seized.

In United States ex rel. Nickens v. La Vallee, 391 F. 2d 123 (C.A. 2d Cir. 1968) this Court rejected arguments that Warden v. Hayden, 387 U.S. 294 conferred discretion on officers to seize property as evidence though not particularly described in the search warrant. The Court in rejecting such argument held that the Marron case (supra) specifically prohibited the seizure pursuant to a search warrant, of any evidence not particularly described in the warrant.

In the instant matter, it is clear that all property not described in the warrant must be suppressed as evidence against the appellant. This is especially so where as here, most of the property seized was after the object of the search warrant was located and seized. United States v. Highfill, 334 F. Supp. 700 (D.C. Ark. 1971). See also: United States v. Baldwin, 46 F.R.D. 63 (1969); and United States v. Spallino, 24 F. 2d 567.

CONCLUSION

For the foregoing reasons, the conviction on Counts I-IV must be reversed and dismissed, or remanded for retrial.

Respectfully Submitted,

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